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Issue Date: 08 December 2004

Case No.: 2004-LHC-0929

OWCP No.: 5-108616

In the Matter of

EARNEST BAZEMORE,
Claimant

v.

VIRGINIA INTERNATIONAL TERMINALS, INC.,
Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest

Appearances:

Gregory Camden, Esq.
For Claimant

R. John Barrett, Esq.
For Employer

Ronald Gurka, Esq.
For the Director

Before: LARRY W. PRICE
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("the Act"), 33 U.S.C. § 901 et. seq. Earnest Bazemore ("Claimant") sought compensation for a disability against Virginia International Terminals, Inc. ("Employer"). On September 8, 2004, this Court was notified that the Parties had reached a settlement agreement regarding indemnity and medical benefits for the work-

related injuries. By letter dated May 7, 2004, the Court was advised that the Parties agreed that Claimant is permanently partially disabled and entitled to receive $901.28 per week in indemnity benefits. The only remaining issue is Employer's request for partial relief from the Special Fund pursuant to Section 8(f) of the Act. On this issue, both Employer and the Director submitted briefs. Employer has also submitted Employer's exhibits[1] which, without objection, are admitted into evidence.

Based on the evidence introduced and the arguments presented, I find as follows:

FINDINGS OF FACT

Claimant was employed as a crane operator by Employer. On March 14, 2000, Claimant injured his back while dismounting Employer's crane. (EX 8 at 11). He was brought to the hospital where he was diagnosed with acute lumbar strain. (EX 4 at 4-5). Claimant then began treatment with Dr. Morales, who concluded that Claimant had probable lumber nerve root compression at the L5 segment and a decreased range of motion. Dr. Morales administered cortisone injections for Claimant's back pain. Claimant continues to be treated by Dr. Morales. (EX 6).

Claimant was also examined by Dr. J Abbott Byrd, III on April 26, 2000. Dr. Byrd concluded that Claimant had a right L5 radiculopathy, which Dr. Byrd believed occurred as a result of the March, 2000 injury aggravating a previous injury. Dr. Byrd also had Claimant undergo an MRI, which was reviewed by Dr. Hecht-Leavitt. His conclusion was that Claimant's back condition was the result of degenerative disc disease. (EX 2).

Prior to this injury, Claimant has suffered a series of injuries to his back, wrist and knee. On December 17, 1976, Claimant was involved in a car accident and was treated at Portsmouth Orthopedic Associates. (EX 3 at 30). Claimant was diagnosed with mild cervical spine and lumbosacral spine strain and sprain. In August 1980, Claimant again injured his back when he slipped off a chassis. (EX 3). Due to this injury, Claimant suffered low back pain on and off for several years. On September 6, 1980, Claimant also injured his back while picking up a heavy object at work. He was examined by Dr. Psimas, who concluded that Claimant's back condition was chronic and he would have recurring back symptoms. In February 1986, Claimant again was involved in an accident at work when the crane he was operating was struck by a railcar. (EX 3 at 3-4). He was treated for a bruised back and neck. Lastly, Claimant injured his right wrist, right posterior hip and right knee when he fell out of a truck at work on August 27, 1992. Dr. Morales treated Claimant for these injuries and ordered an MRI and arthroscopic surgery on Claimant's right knee. (EX 6). On March 8, 1993, Dr. Morales noted that Claimant had a 15% permanent partial disability rating for his knee. (EX 1 at 76; EX 8 at 6).

[1] The following abbreviations will be used as citations to the record: EX – Employer's Exhibits; DB – Director's Brief; EB – Employer's Brief.

DISCUSSION

Section 8(f) was intended to encourage the hiring or retention of partially disabled workers by protecting employers from the harsh effects of the aggravation rule. See C& P Tel. Co. v. Director, OWCP, 564 F.2d 503, 512 (D.C. Cir. 1977). Without such protection, employers would be justifiably hesitant to employ partially disabled workers for fear that any additional injury or subsequent aggravation of underlying conditions would result in a much greater degree of liability since such workers would suffer from a greater overall disability as a result of the second injury or aggravation than healthy workers would have. See Director, OWCP v. Campbell Indus., 678 F.2d 836, 839 (9th Cir. 1982). See also H. Rep. No 92-1441, 92nd Cong., 2d Sess. 8 (1972), reprinted in 1972 U.S. Code Cong. & Admin. News 4698, 4705-06; A. Larson, Workers' Compensation Law § 59.00 (1992). In furtherance of this goal, the provisions of § 8(f) are to be liberally construed. See Director v. Todd Shipyard Corp., 625 F.2d 317 (9th Cir. 1980).

Section 8(f) shifts part of the liability for permanent partial and permanent total disability from the employer to the Special Fund, established by Section 44, when the disability or death is not due solely to the injury which is the subject of the claim. The employer bears the burden of establishing its eligibility for § 8(f) relief. 20 C.F.R. § 702.321 (2004). In order to shift liability under § 8(f) three essential elements must be shown. The record must establish that: (1) the employee had a pre-existing partial disability; (2) the partial disability was manifest to the employer; and (3) it rendered the second injury more serious than it otherwise would have been. Director, OWCP v. Berkstresser, 921 F.2d 306, 309, 24 BRBS 69 (CRT) (D.C. Cir. 1990), rev'g 16 BRBS 231 (1984), 22 BRBS 280 (1989). If those elements are met, an employer's liability is limited to 104 weeks of compensation.

There is an additional requirement in cases of permanent partial disability. In those cases, the disability must be "materially and substantially greater than that which would have resulted from the new injury alone." Director, OWCP v. Ingalls Shipbldg., Inc. (Ladner), 125 F.3d 303, 306 (5th Cir. 1997). Furthermore, the Fourth Circuit has held that the administrative law judge "may not merely credulously accept the assertions of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based." Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Carmines), 138 F.3d 134, 140 (4th Cir. 1998). An award of relief under this section must be supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. The standard established by the Fourth Circuit in Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., (Harcum I), 8 F.3d 175 (4th Cir. 1993), aff'd, 514 U.S. 122 (1995), requires quantification of the level of impairment that would ensue from the work-related injury alone. In other words, an employer must present evidence of the type and extent of disability that the claimant would suffer if not previously disabled when injured by the same work-related injury. Carmines, 138 F.3d at 139. This quantification element is necessary because once the employer establishes the level of disability in the absence of pre-existing permanent partial disability, this Court "will have

a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater." Harcum I, 8 F.3d at 185.

The Director concedes, and the Court finds, that Claimant had pre-existing degenerative back, neck, right arm, right hand and right knee disabilities based on the medical reports submitted with Employer's Exhibits 1 through 8. Based on these same exhibits, the Director concedes and the Court finds that the pre-existing partial disability was manifest to Employer prior to the subsequent work-related injury. (DB at 4-5).

The issue for the Court to decide is whether Claimant's ultimate permanent partial disability materially and substantially exceeds the disability that would have resulted in the absence of the pre-existing disability. The Director asserts Employer has not met the standard established by the Fourth Circuit in Harcum I, requiring quantification of the level of impairment that would ensue from the work-related injury alone.

In support of this element, Employer has presented the opinions of Claimant's treating physicians. Dr. Byrd, Dr. Carr and Dr. Morales all agreed that Claimant's work related injury aggravated his pre-existing conditions. (EB at 15). Dr. Morales testified that Claimant's work related injury in March 2000 was minor and would not have caused Claimant much difficulty if he had a healthy back at the time of the accident. (EX 6 at 18). In support of this conclusion, Dr. Morales explained how Claimant's back was more susceptible to injury because the previous injury had impaired the back's flexibility, height and elasticity. (EX 6 at 19).

Employer also relies on vocational evidence to quantify the level of impairment. Employer argues that each of Claimant's previous injuries limited the jobs he was capable of performing. Claimant's injury to his back and neck in 1986 and his injury to his wrist and knee in 1992 combined to limit his work capacity to moderate or medium level. (EB at 16). Consequently he could no longer perform lashing or other general longshore positions. Claimant then suffered a back injury in 1996, which further diminished his job opportunities. Specifically, Claimant was no longer able to operate forklifts, drive hustlers, or operate transtainers. (EB at 17). Due to the combination of these injuries, Employer argues that Claimant's "relatively minor" injury at work in March 2000 was the last event that eventually rendered Claimant ready to retire from the longshore industry. (EB at 17-18).

The Director argues that this evidence is insufficient because it does not establish the extent and seriousness of the work-related injury alone. I agree. This evidence does not satisfy the requirements defined by the Fourth Circuit in Harcum I. According to the Fourth Circuit, in order to adequately satisfy the quantification element, an employer must establish the level of disability in the absence of a pre-existing permanent partial disability. See Harcum I, 8 F.3d 175 (4th Cir. 1993). Employer's evidence does not quantify any of Claimant's impairments. Instead, the medical and vocational evidence offered only consists of generalized and conclusory statements without supporting evidence.

Dr. Morales' testimony is illustrative of these problems. His testimony does state that Claimant's current condition is the result of the most recent injury aggravating pre-existing injuries. However, rather than quantify the impairment that would exist absent the earlier injuries, Dr. Morales merely states that the current condition is a combination of all previous injuries. The contribution element is not satisfied by simply asserting that the condition is worse because of a previous injury. The Fourth Circuit, in Newport News Shipbuilding & Dry Dock Co. v. Ward, 326 F.3d 434 (4th Cir. 2003), found this type of evidence to be insufficient. In Ward, the Employer offered a medical report in order to establish quantification. The report included conclusions by the physician that neither the previous injury nor the work-related injury at issue "alone would have disabled [the claimant] from performing light duty Shipyard work. However, the . . . cumulative effect [of the injuries] have disabled [the claimant] from even light duty Shipyard work." Id. The Court found this statement conclusory and without any supporting evidence.

In the instant case, neither the medical nor vocational evidence quantifies the degree of impairment that would be caused by the injury at issue. The evidence submitted is similar to that relied upon in Ward. The opinions by the doctors in both Ward and this case assert that the resulting condition is a combination of a few injuries. However, this clearly falls short of the Fourth Circuit's requirement that the employer "present evidence of the type and extent of disability that the claimant would suffer if not previously disabled when injured by the same work-related injury." Carmines, 138 F.3d at 139. Furthermore, the Fourth Circuit has warned that when the court is "assessing whether the contribution element has been met, an ALJ may not merely credulously accept the assertions of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based." Id. at 140. The conclusions drawn in the documents provided by Employer do not provide evidence regarding the disability that would have resulted from the last injury alone.

Upon consideration of this evidence, I find that Employer has not quantified the level of impairment that would ensue from the back injury. Therefore, I find that Employer has not satisfied the requisite three elements to be entitled to § 8(f) relief in regards to payment of compensation benefits related to Claimant's March 14, 2000 workplace accident.

Conclusion

Based on the foregoing findings of fact, conclusions of law and the entire record, I hereby enter the following compensation order. All other issues not decided herein were rendered moot by the above findings.

ORDER

It is hereby ORDERED, JUDGED AND DECREED that:

1. Employer shall pay Claimant permanent partial disability compensation from March 14, 2000 and continuing based on a compensation rate of $901.28 per week.

2. Employer's request for relief under § 8(f) of the Act is Denied.

3. Employer shall pay all reasonable and necessary medical expenses related to the treatment of Claimant's back injury.

4. Employer shall receive a credit for benefits and wages paid.

5. Employer shall pay Claimant interest on any accrued unpaid compensation benefits at the rate provided by 28 U.S.C. § 1961.

6. Within thirty days of receipt of this Order, counsel for Claimant should submit a fully-documented fee application, a copy of which shall be sent to opposing counsel, who shall have twenty days to respond.

7. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

A

LARRY W. PRICE
Administrative Law Judge

LWP/TEH